

**COURT OF APPEALS
DECISION
DATED AND FILED**

FEBRUARY 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1450

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

BARBARA MUNSON AND STUDENTS A, B, AND C,

PLAINTIFFS-APPELLANTS,

V.

**STATE SUPERINTENDENT OF PUBLIC INSTRUCTION AND
SCHOOL DISTRICT OF MOSINEE,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Marathon County:
GREGORY E. GRAU, Judge. *Affirmed.*

Before Cane, P.J., Myse and Schudson, JJ.

PER CURIAM. Barbara Munson and Students A, B and C appeal from an order affirming a Department of Public Instruction (the department) decision which concluded that the Mosinee School District had not violated the pupil nondiscrimination provisions of § 118.13, STATS., and WIS. ADM. CODE

§ PI 9. The appellants argue that (1) the department did not apply the correct definition of "reasonable person similarly situated" when analyzing Mosinee's use of an Indian logo and its effect on the school environment; (2) it erroneously relied on two United States Department of Education, Office of Civil Rights (OCR) cases when determining that there was no notice of a hostile environment; and (3) the racial harassment due to the use of the school logo was severe, pervasive, and provided notice to the school district of a racially hostile environment. We affirm the order.

The Munsons are a Native American family, including three former students of Mosinee High School and their mother. In October 1992, the state superintendent of schools issued an advisory letter requiring school districts that used Indian mascots and logos to review their use.¹ During October, in a letter to the Mosinee School District administrator, Student B objected to the school's use of the Indian logo. The Mosinee School Board, however, voted to retain the Indian logo and team name.

In April 1994, the state school superintendent sent a letter to sixty-five school districts, including Mosinee, stating that regardless of the legality of the use of Indian symbols, they are entirely inappropriate and steps should be taken to eliminate them. Student B wrote another letter to the high school principal complaining about the use of the school logo and nickname. After Munson and her daughter appeared before the board, it again voted to retain the logo and team name.

¹ The Munsons refer to the logo as an "Indian" logo. It portrays the profile of an adult male Indian wearing a feather headdress.

In May 1994, the Munsons filed a formal complaint under § 118.13, STATS., alleging discrimination on the basis of race, national origin and ancestry and asked that the Indian logo and nickname be eliminated. The Mosinee School Board denied their complaint. In June 1994, the Munsons then filed an appeal of the board's determination to the state superintendent. The department conducted an investigation that "included a review of policies, procedures and other materials submitted by the district, an on-site visit to the Mosinee High School, and interviews of the appellants, staff and students in the district."

The record reveals that Student B recalled being called names, including "stupid Indian" and that during spearfishing seasons she heard almost daily taunts, including "Indians should be killed, not the fish." She felt it was hypocritical that the same people who hate the Indian race could shout "Go Indians" at athletic events in support of their team. Additionally, one girl was called "the squaw." She believed the logo taught people how to stereotype. At pep rallies, students would mimic Indian dancing and make stereotypic "war cries." She also complained that the school district did not teach Indian culture.

Munson spoke from the point of view of a parent dealing with self-esteem and cultural identity issues impacting her family. In her letter to the board, she stated that the public schools must cease to be a vehicle supporting and displaying racial stereotypes. She noted that the school district claimed to promote sensitivity toward cultural diversity, yet used ethnic stereotypes and demeaned religious practices of Indian people.

During the appeal process, Munson explained that logos promote ignorance and that Indian men are not limited to the role of warrior. She also felt that depictions of mighty warriors of the past emphasize a tragic part of Indian

history, focusing on wartime survival; they deny the strength, order and beauty of her culture during times of peace, and imply that the only real Indians are in the past.

One Mosinee High School student who was interviewed commented that stereotypes can be insulting to Indians by implying that they are a savage and war-like people. The student also felt that a stereotype could be detrimental to non-Indians because they were getting a distorted picture and not learning about real cultures.

In its investigation, the department identified three issues: whether the Mosinee School District violated § 118.13, STATS., and WIS. ADM. CODE § PI 9 by (1) failing to adopt, implement or use the required pupil nondiscrimination policies and complaint procedures; (2) approving use of Indian logos, nicknames and mascots; and (3) discriminating against Students A, B, and C on the basis of race, national origin or ancestry. It answered the first affirmatively and the next two in the negative.

With respect to the use of Indian logos, nicknames and mascots, the department made extensive findings of fact, including:

The Mosinee High School currently uses the nickname of "Indians" and has a logo depicting an Indian wearing a full feather headdress or "war bonnet" in the "Plains Indian" Style. ... The logo is not an accurate depiction of an American Indian from any particular tribe from Wisconsin.

... The logo and nickname is [sic] used primarily in conjunction with athletic events. Currently, the logo and the slogan "Go Indians" appears [sic] on scoreboards located in the gym and on the football field. A large sign with the logo and the phrase "Mosinee Indians" is located on the opposite end of one of the scoreboards. The phrase "This is Indian Country" is written in large letters on a wall near the gym. The phrase "Home of the Indians" is located

on one side of the concession stand. Furthermore, the logo appears on diplomas, certificates, tee-shirts, sweatshirts, on the gym floor, on the back side of the concession stand, and on the high school bulletin board in front of the main office.

....

... [S]tudents and other fans use cheers that refer to the "Indian" nickname. However, the cheerleaders have been told by the athletic department not to use cheers with the word "Indian" in them. The band plays some songs with an "Indian" theme, including the Florida State Seminole song. Some students and fans at the sporting events also engage in racially stereotypic behavior. Some students do the "tomahawk chop," although if the principal notices it, he will ask the student(s) to stop. ... A few students ... wear face paint or feathers.

Additionally, the department found that Mosinee High School has used the Indian logo since the 1920s, but reduced its use in the past few years. For example, the logo has been removed from all team sport uniforms, except those for basketball. The team mascot, a young woman dressed in a white fringed costume with moccasins, is no longer used by the teams, and certain cheers and songs with an Indian theme are no longer used.

The department also found that teachers, students and administrators appear to be divided on the logo issue. One teacher never felt comfortable using a group of people as a mascot. Some stated that if Native Americans were offended, that in itself was sufficient grounds to remove the logo. Others felt no harm was intended.

In addition, the department also noted that the Mosinee community is divided, but that the Indian tribes in Wisconsin are in agreement in seeking to have Indian logos removed from schools. It observed that the Oneida tribe, Great Lakes Intertribal Council, United Indian Nations of Oklahoma, National Congress

of American Indians, and Wisconsin Indian Education Association Board of Directors have all passed resolutions condemning the use of the Indian logo.

The department concluded:

Moreover, this logo is clearly offensive to the appellant and her children. However, the reasonable person standard must be followed. In applying this standard to the Mosinee "Indian" logo, the department concludes that it is not clear that a reasonable person, similarly situated to the appellant, would find that the logo presents a negative stereotype of American Indians. ... The appellant's argument relies on the premise that all Indian logos are per se discriminatory. ... [T]he department must review each logo independently and determine whether the logo is discriminatory because it depicts a negative stereotype. In this appeal, the department concludes that use of the Mosinee high school logo is not discriminatory because it does not, based on the reasonable person standard, per se, depict a negative stereotype. (Emphasis in original).

On appeal, the circuit court affirmed the department's determination.

Our scope of review is prescribed by § 227.57, STATS. We review the decision of the agency, not that of the circuit court. *Thompson v. DPI*, 197 Wis.2d 688, 697, 541 N.W.2d 182, 185 (Ct. App. 1995). It is the appellant's burden to establish grounds to overturn that decision. *Shoreline Park Preservation v. DOA*, 195 Wis.2d 750, 761, 537 N.W.2d 388, 391 (Ct. App. 1995). Findings of fact will not be upset unless they are unsupported by substantial evidence in the record. An agency's legal conclusions and interpretations of statutes are issues of law subject to varying degrees of deference on appeal. *Id.* at 761, 537 N.W.2d at 391-92. If the agency's interpretation is long-standing or entails its expertise or specialized knowledge, we will affirm if its interpretation is reasonable, even if another conclusion would be equally reasonable. *Id.* If the question before the agency is very nearly one of first

impression, the court grants the agency decision "due weight." *Soo Line R.R. v. Commissioner of Transp.*, 170 Wis.2d 543, 549, 489 N.W.2d 672, 674-75 (Ct. App. 1992). Where it is one of first impression for the agency, and the agency lacks special experience considering the question presented, its decision is not entitled to deference and we review the decision de novo. *Id.*

The Munsons contend that the correct standard should be de novo in large part because § 118.13, STATS., has not been construed by appellate courts. The respondents point out, however, that although the department has limited experience specifically regarding logo issues, the department has been applying § 118.13 and WIS. ADM. CODE § PI 9.02 to numerous discrimination cases since the statute was enacted ten years ago. Under these circumstances, we conclude that the department's legal conclusion should be given due weight.

The department agrees that a school district violates § 118.13, STATS., if its use of an Indian logo discriminates against a protected class of persons, including American Indians.² Discrimination includes stereotyping and harassment. WIS. ADM. CODE § PI 9.02(5).³ Stereotyping means attributing

² Section 118.13(1), STATS., provides in part:

No person may ... be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's ... race, religion, national origin, ancestry

³ WIS. ADM. CODE § PI 9.02 states in part:

(5) "Discrimination" means any action, policy or practice, including bias, stereotyping and pupil harassment, which is detrimental to a person or group of persons and differentiates or distinguishes among persons, or which limits or denies a person or group of persons opportunities, privileges, roles or rewards based, in whole or in part, on ... race, national origin, ancestry ... or which perpetuates the effects of past discrimination.

....

(continued)

behaviors, abilities, interests, values or roles. WIS. ADM. CODE § PI 9.02(14). However, stereotyping constitutes discrimination if it is "detrimental" to a protected class. WIS. ADM. CODE § PI 9.02(5).

The Munsons argue that the department erroneously concluded that the Indian logo did not discriminate because it failed to apply the correct definition of "reasonable person similarly situated" when analyzing the logo and its effect. She argues that recent case law emphasizes the importance of considering the victim's perspective of the harassment. See *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991). She further argues that a school environment calls for zealous protection against discrimination. See *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993).

Contrary to the appellants' argument, the record discloses that the department articulated the test from the perspective of Munson and her children. The department concluded:

In determining whether the Mosinee logo represents a discriminatory stereotype, the standard cannot be whether the logo is merely offensive because any logo may be offensive to some. Rather, the standard must be whether a reasonable person, one similarly situated to the appellant or her children, would find that the logo depicts such a

(9) "Pupil harassment" means behavior towards pupils based, in whole or in part, on ... race, national origin, ancestry ... which substantially interferes with a pupil's school performance or creates an intimidating, hostile or offensive school environment.

....

(14) "Stereotyping" means attributing behaviors, abilities, interests, values and roles to a person or group of persons on the basis, in whole or in part, of their ... race, national origin or ancestry

negative stereotype that it is detrimental or harmful to a protected class or person.

Nonetheless, the Munsons contend that twenty-one of the twenty-three students interviewed during the department's investigation were white, and only one student's family identified itself as belonging to a particular Indian tribe and having a personally meaningful Indian identity. Therefore, they argue that the correct standard was not in fact applied.

The record, however, does not support their premise. The department attempted to interview all Indian students enrolled in the high school, a small but representative sample of other students of color (Asian, African American, Hispanic), and a representative sample of the student body in general. Of the twenty-three students, ten identified themselves as "student of color/minority student."⁴ Of those ten, one belonged to an Indian tribe, two identified themselves as having "a little Indian in their ancestors['] bloodlines," one was "small part Indian" but not affiliated with a tribe, and one student's father was an Indian. The students interviewed believed there were between two and six Indian students in the school. Additionally, the department considered that various Indian tribes opposed the use of Indian logos and mascots. It observed that the Oneida Tribe, the Great Lakes Intertribal Council, United Indian Nations of Oklahoma, the National Congress of American Indians, and the Wisconsin Indian Education Association Board of Directors have all passed resolutions condemning the use of Indian logos.

⁴ The record indicates, without elaboration, that three of the ten minority students "were not interviewed as scheduled."

The department also determined that it must engage in an individualized review of the specific logo in question. *See* 80 Op. Att'y Gen. 321 (1992). It concluded that it was not clear a reasonable person, similarly situated to the Munsons, would find that the logo presents a negative stereotype of Indians. It observed that the specific logo in question is not a caricature or cartoon figure, but portrays a profile of a face of an adult male Indian wearing a full feather headdress in the "Plains Indian" style. It noted that the image did not accurately depict any particular tribe, but found that, from the perspective of a reasonable person similarly situated to the Munsons, it does not depict a negative stereotype. As a result, the department determined that the logo was not detrimental to a protected class and, therefore, its use was not discriminatory. Because the record supports the department's determination that the Indian logo does not reflect a negative stereotype and was not detrimental to a protected class, there is no basis under § 227.57, STATS., to overturn the department's decision.

Next, the Munsons argue that the department erroneously relied upon two civil rights cases when determining that there was no notice of a hostile environment. They argue that by applying the OCR cases that dealt with racially hostile environments at the university level, the department's analysis failed to take into account the differences in age, maturity level, and perceptions between adult and adolescent students. We are not persuaded.

"Pupil harassment" includes behavior toward pupils based in whole or in part on race, national origin or ancestry, which creates an intimidating, hostile or offensive school environment. WIS. ADM. CODE § PI 9.02(9). The department concluded that guidelines set forth by the OCR regarding discrimination due to a hostile environment are useful authority. The OCR guidelines set forth and apply a "hostile environment analysis" to programs and

activities that receive federal assistance. Notices, Department of Education, *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448, 11,449, 11,451, 11,452 (March 10, 1994).

Courts may consider several factors, including the frequency of discriminatory conduct, its severity, whether it is physically threatening or humiliating or merely offensive, and whether it unreasonably interferes with performance. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). OCR applies these factors to the educational setting, considering the age and race of the victim, the nature of the incidents, the size and location of the relationships of the individuals, and other incidents at the school. Notices, *supra*, 59 Fed. Reg. at 11,449. First, an objective standard is applied, and second, a subjective standard. *See Brooms v. Regal Tube Co.*, 881 F.2d 412, 418-20 (7th Cir. 1989). In addition, the student must prove that the school received actual or constructive notice. Notices, *supra*, 59 Fed. Reg. at 11,449. Once the school has notice of a hostile environment, it must take steps to eliminate such hostile environment. *See id.*

We conclude that the department did not err in referring to the OCR guidelines and cases applying those guidelines. The department stated:

The OCR will find a violation of Title VI of the Civil Rights Act of 1964 if it finds that (1) a racially hostile environment exists, (2) of which a [school district] has actual or constructive notice (3) and where the [school district] has not taken action reasonably calculated to redress the hostile environment.

It observed that the OCR defined a racially hostile environment as one where racially harassing physical, verbal, graphic or written conduct is sufficiently

severe, pervasive or persistent to interfere with or limit the ability of an individual to participate in or benefit from the school's activities.

In applying these guidelines to the present case, the department noted that the OCR addressed related issues in two separate school districts. In the Quincy, Massachusetts, Public School District, a school logo was reasonably viewed by many as a caricature of a Native American. No student had complained of racially discriminatory conduct. The OCR concluded that the one reported incident of racially derogatory comments was not severe, persistent or pervasive conduct.

The second case involved the University of Illinois' use of Chief Illiniwek as its mascot, the use of an Indian logo and the university's nickname, "Fighting Illini." In addition to allegations that the use of the symbols contributed to a racially hostile environment, the OCR received numerous allegations of racial harassment. After investigation, the OCR found that many allegations were not substantiated, and that the incidents were isolated, spread over a six-year period and involved different individuals. Based on all the circumstances, the OCR concluded that the allegations of which the university had notice were not sufficiently severe, pervasive or persistent to rise to the level of a racially hostile environment.

Here, the department concluded that based upon the totality of the circumstances, it could not find a severe, persistent and pervasive pattern of racially hostile acts directed at the appellant's children, "of which the district had actual or constructive notice," which rose to the level of a racially hostile environment. It found:

Although the appellant and Student B stated ... that there were numerous incidents involving racial slurs, most of these incidents were not reported to school authorities when they occurred. Student B herself acknowledged that she learned to "grin and bear" the racial slurs. ... only at one time did Student B inform her teacher that racial slurs were being made in class, and the teacher at that time did attempt to take corrective action.

The department observed further that the principal brought Student B's concerns to the attention of the teachers and staff, and that the use of the logo, mascot and certain cheers had lessened. The Munsons do not challenge the department's factual determinations. Because the department reviewed the nature and frequency of the conduct, its severity and its persistence from both an objective and subjective viewpoint, its analysis, including the consideration of the two civil rights cases, is not erroneous.

Next, the Munsons argue that the racial harassment resulting from the use of the logo was severe and pervasive, providing notice to the Mosinee School District of a racially hostile environment. They contend that the record from the investigation and factual findings reflect incidents of racial harassment known by the administration. They note that the school district attempted to curtail the use of the logo, mascot and certain cheers; that four members of the school district voted not to retain the logo; and that eighth graders voted to rename the teams the "Eagles." We conclude that these examples fail to constitute persistent and pervasive racial harassment. Rather, they are examples of responses to the allegations of discrimination. The Munsons contend that their descriptions to school officials of the harm caused by the logo show a racially hostile environment. This argument essentially restates previous arguments, to which we

responded that the department applied the appropriate legal principles in reaching its decision that the logo was not detrimental or discriminatory.⁵

Finally, the Munsons argue that actual and constructive notice of a hostile environment existed. Student B did inform her teachers of an incident and notified the principal of racial harassment. However, the department found that "the teacher at that time did attempt to take corrective action" and "the principal took these incidents seriously and brought them to the attention of teachers and staff." These examples do not show severe, persistent racial harassment, but show action reasonably calculated to address the Munsons' concerns. Because we affirm the department's holding that the Indian logo is not detrimental, we reject the Munsons' argument that placement of the logo on the interior walls, clothing and stationery created notice. Based upon our narrowly defined standard of review as set forth in § 227.57, STATS., we conclude the Munsons have not met their burden of establishing grounds to command a reversal of the agency's decision.

By the Court –Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

⁵ The Munsons also argue that they were not informed of any formal complaint procedure. Because the department concluded that Mosinee failed to use the required complaint procedures, this argument is not grounds for reversal.

